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July 2, 1998

BY HAND DELIVERY

The Honorable William E. Kennard
Chairman, Federal Communications Commission
1919 M Street, Room 814
Washington, D.C. 20554

Re: MM Docket 91-58; Caldwell,
College Station and Gause, Texas

Dear Chairman Kennard:

On June 26, 1998, Bryan Broadcasting License
Subsidiary, licensee of KTSR in College Station, Texas,
filed a "response" to a letter earlier filed with you on
June 11 by Roy E. Henderson, permittee of KLTR, Caldwell,
Texas, in which Henderson had requested Commission action on
the Application for Review that Henderson had filed in this
case on June 10, 1996, and which remains pending before the
Commission.

To the extent that the letter filed by Bryan is not
only factually incomplete but also contains several alleged
statements of "fact" on important matters relating to this
case which are simply and totally wrong (and demonstrably so
by reference to the record of this case), Henderson has no
choice but to point out those errors to avoid confusion in
the record.

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In early 1988, Henderson filed a petition to upgrade channel 236A to Channel 236C2 in Caldwell. Shortly thereafter, Bryan filed a petition to take the channel from Caldwell to use in upgrading its KTSR in College Station. The Bryan request was subsequently recognized in Docket 88-48. In May of 1989, Bryan accepted payment from other parties in Docket 88-48 in a settlement where Bryan then amended its proposal to abandon its request for Henderson's channel in Caldwell, and instead asked the Commission to grant it an upgrade for KTSR to channel 297C3, indicating to the Commission at that time that it had abandoned its prior request for channel 236 and that it would proceed to build on 297C3 if granted by the Commission.

Henderson did **NOT** oppose that amended proposal by Bryan and in fact, on May 19, 1989, filed Comments recognizing the change requested by Bryan and relying upon recognition and adoption of that change so that the upgrade on 236 previously requested by Henderson was now without conflict (Bryan having now advised the Commission it had 'abandoned' that proposal in favor of 297C3) and could also be acted upon by the Commission. Despite the fact that Bryan had indicated to the commission that it had 'abandoned' its plans to take 236 from Caldwell, and had no further conflict with Henderson on Henderson's requested upgrade of 236 at Caldwell, for some mysterious reason on May 30, 1989, Bryan nonetheless filed an Opposition to Henderson's Comments.

In April of 1990, the Commission issued its Report and Order in Docket 88-48 granting Bryan's requested upgrade to 297C3 but taking no action on Henderson's request to upgrade on 236. In May of 1990 Henderson filed an Application for Review of that Report and Order contesting only its failure to consider his own upgrade request and **NOT** contesting or opposing in any way the upgrade to Bryan on 297C3. When the Application for Review was denied, Henderson in May of 1991 filed a petition for Reconsideration which again concerned only his own request for upgrade and did **NOT** contest or oppose in any way the upgrade granted to Bryan on 297C3.

We also note that the allocation to Bryan did not require the change of anyone else's channel and that the automatic stay provisions of 47 CFR 1.420(f) then in effect did not apply, and we further note that Henderson never requested a Stay of any kind and none was imposed by the Commission. The simple fact is that the authority conveyed to Bryan in Docket 88-48 for KTSR to proceed with construction of 297C3 became effective in May of 1990 and

Bryan could have begun the construction process then, eight years ago, had they chosen to do so. 1/

Bryan's claims that Henderson opposed its new allocation on 297C3 are simply and totally false. It could have built that upgrade over eight years ago, or even if it waited for finality of the Order in Docket 88-48 (although there was no reason to do so since the appeals in that case did not ever challenge the allocation of 297C3 to Bryan) it could have constructed over five years ago, thereby not only implementing its prior promise to the Commission to do so when it requested that upgrade but also clearing the way for other stations such as KRTS and KMBV which have been precluded from implementing their own improvements due to Bryan's continued refusal to vacate its old channel.

As for Bryan's current position in Docket 91-58, we think that is simply appalling, and we certainly do not agree that Henderson's continued appeals are "meritless". The Henderson proposal is vastly superior in public interest benefits, providing additional service (i.e. beyond that offered by the Bryan proposal) to 20,600 additional people throughout an additional 2,250 sq.km, yielding class C2 and class C3 services, as opposed to the Bryan proposal which would result in only a class A and Class C2. But the Henderson proposal was rejected by the Allocations Branch on the alleged failure of Henderson to comply completely with the city grade coverage requirements of rule 73.315(a).

The alleged deficiency (it is disputed by Henderson) is claimed to be slightly less than 4% of the area of the city of Caldwell, lying in the airport area, and estimated by Henderson's engineer to contain "about 25 people". Nonetheless, the Allocations Branch found the rule to be

1/ It is noted that Henderson filed a request that issuance of the construction permit for 297C3 be held in abeyance until appeals of 88-48 were completed but that the Mass Media Bureau correctly noted that the pending appeal of any aspect of 88-48 had no effect upon the effectiveness of the grant to Bryan and the c.p. was issued. In November of 1991, Henderson filed an Application for Review of the issuance of the c.p. noting that Bryan had by that time already filed comments in Docket 91-58 indicating it did not really intend to build on 297C3 and renewing its 'abandoned' request to take channel 236 from Caldwell. That was the last pleading ever filed by Henderson relative to any aspect of Bryan's 297C3 allocation and that was seven years ago.

absolute and rejected Henderson's proposal in favor of the Bryan proposal which, at that time, the Allocations Branch believed to be in 'full compliance' with the coverage requirements of Rule 73.315(a).

They were disabused of that assumption when Bryan filed its construction permit application for channel 236C2 and was forced to disclose^{2/} that its own proposal actually fails to meet the city grade requirements of 73.315(a) by 8.4% and the deficiency is not over an airport/industrial area but over an area containing 4,158 people.^{3/} Faced with the disclosure that it failed to meet the requirements of 73.315(a) by 8.4% of area and 4,158 in population (versus the alleged deficiency of Henderson of less than 4% area and 24 people) Bryan claimed that it was perfectly acceptable for them, relying upon a letter from the Acting Chief of the FM Branch to Southwest Communications dated July 16, 1986, and purporting to consider 80% compliance with rule 73.315(a) good and sufficient to be considered substantial compliance with the rule, no waiver required, but only at the application stage. This informal "modification" of the rule requirements was made by an "Acting Chief" of a staff level, without benefit of any rulemaking or explanatory comments and it was never explained why acceptance of such a substantial deficiency and application of the rule by one staff branch of the commission but not another was logical, fair, or warranted. The instant case of a hybrid allocation/application proceeding involving station upgrades of existing allocations provides vivid illustration of the problems presented by that "informal rule modification" and why it must be reconsidered by the Commission.

Bryan may choose to refer to Henderson's continued complaint as to the determination, thus far, of this case as "meritless" but we don't think so. In addition, Henderson's continued prosecution of his appeal of Bryan's proposal to take Henderson's channel 236 from Caldwell, thereby dooming that station from ever being upgraded at Caldwell was

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- 2/ The full circumstances of how this fact was eventually forced out are fully described in Henderson's Second Supplement filed September 29, 1997, in this proceeding.
- 3/ Notwithstanding the specific direction in form 301 to include population figures for any such deficiency in city grade coverage, Bryan never supplied any such figures. The estimate of population was done by Henderson's Consulting Engineer and supplied in its Reply to Opposition filed October 24, 1997.

totally predictable and could have been anticipated by Bryan.^{4/} Having done so, Bryan could have built its first upgrade on channel 297C3 eight years ago, but chose not to. That was their choice, for their reasons, disclosed and undisclosed, not Henderson's.

Finally, to the extent that Bryan attacks Henderson's Motion for Stay in this proceeding, it is wrong on just about everything it said. When the FCC deleted the automatic stay provisions of 47 CFR 1.420(f) (by Report & Order August 8, 1996), it did not "...determine that it would no longer grant a stay under such circumstances" as claimed by Bryan. It said just the opposite indicating that it would indeed consider special requests for stay and would be "particularly cognizant of requests for stay by any party [such as Henderson in this case] whose authorization would be changed involuntarily". In addition, this Motion for Stay, filed with the full Commission on September 23, 1996, remains pending with the Commission now and has not been "rejected by the Commission", as also wrongly claimed by Bryan.

In view of the age of this case, the burden upon other licensees resulting from Bryan's failure to implement its first upgrade or to vacate its old channel, and the delay of increased service to the several areas, Henderson again requests that the Commission act upon the pending Application for Review at the earliest possible time.

Respectfully submitted,

Roy F. Henderson

By: Robert J. Buenzle
Counsel

^{4/} Bryan complains at one point of Henderson attempting to "derail" KTSR's efforts to upgrade its station. That is truly ludicrous. Henderson doesn't care what KTSR does with its station except to the extent that KTSR wants to take Henderson's channel and Henderson's proposed upgrade to do it. Is that not understandable?

The Honorable William E. Kennard, Chairman
July 2, 1998
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cc: By Hand Delivery:

The Honorable Harold W. Furchtgott-Roth, Commissioner
The Honorable Gloria Tristani, Commissioner
The Honorable Michael Powell, Commissioner
The Honorable Susan Ness, Commissioner

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